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In the Matter of ADJUSTMENT OF RATES FOR NONCOMMERCIAL EDUCATIONAL BROADCASTING COMPULSORY LICENSE	Docket No. 96-6 CARP NCBRA

REPLY OF BROADCAST MUSIC, INC.
TO THE PETITIONS FOR REVIEW OF
THE PUBLIC BROADCASTERS, ASCAP, AND SESAC, INC.

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Pursuant to 37 C.F.R. § 251.55(b) (1997), Broadcast Music, Inc. ("BMI"), replies to the Petitions to the Librarian of Congress (the "Librarian") dated August 5, 1998 of the public broadcasters, represented herein by the Public Broadcasting Service and National Public Radio (the "Public Broadcasters"), the American Society of Composers, Authors and Publishers ("ASCAP"), and SESAC, Inc. ("SESAC"). Each of these three petitions seeks to modify the Report of the Copyright Arbitration Royalty Panel (the "CARP" or "Panel") issued July 22, 1998, in this proceeding (the "Report"). BMI respectfully requests that the modifications sought by the Public Broadcasters in their Petition be rejected by the Librarian and that the modifications sought by ASCAP in its Petition be adopted in part and rejected in part. Finally, BMI does not oppose the modification to the Report sought by SESAC.

I. THE LIBRARIAN SHOULD REJECT THE MODIFICATIONS PROPOSED BY THE PUBLIC BROADCASTERS.

While the Public Broadcasters start by asserting that they are generally satisfied with the Panel's Report (*PB Petition 1-2*),[1] they nonetheless find fault with the Panel for failing to adopt the Public Broadcasters' methodology to set fees for the future: exclusive reliance on the prior agreements between the parties. Although the Public Broadcasters claim to seek only a "modification" of the Panel's order, they are actually asking the Librarian to set aside the Panel's order altogether and to adopt the completely different methodology proposed by the Public Broadcasters. *PB Petition 4.*

The Public Broadcasters offer three arguments in support of their position. They claim (i) that the Panel committed a "fundamental error" in "assessing the meaning of 'fair market value' " (*PB Petition* 9); (ii) that the Panel erred in its analysis of the no-precedent and non-disclosure clauses in the prior agreements (*PB Petition 13-18*); and (iii) that the Panel erred in concluding that the vast disparity between the rates paid by the Public Broadcasters under the prior agreements and those paid by the commercial broadcasters was evidence of a voluntary subsidy. *PB Petition 18-20.*

The Public Broadcasters are wrong on all three grounds. The Public Broadcasters have failed to show that the Panel acted arbitrarily in considering, but ultimately rejecting, the prior agreements as an appropriate benchmark for setting fees — the test to set aside the Panel's

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1. References to each party's petition to the Librarian will be cited as "*Petition* ___" preceded by the party that submitted the petition and followed by the page number. All other references follow the citation form of BMI's Petition.

Report.[2] To the contrary, the Panel carefully examined the prior agreements, and all the evidence surrounding them and other relevant marketplace facts, and correctly concluded that the prior agreements did not constitute an appropriate benchmark to set fees for the future in this case.

A. The Panel Was Not Arbitrary In Rejecting The Prior Agreements As The Appropriate Benchmarks To Set The Fees In This Proceeding.

The Public Broadcasters agree that the Panel accurately defined its task under 17 U.S.C. § 118 (1996) as finding the fair market value of the rights conveyed, and properly defined "fair market value" to mean the price at which goods or services would change hands between a willing buyer and a willing seller neither being under a compulsion to buy or sell and both having reasonable knowledge of all relevant facts. *Report 9-10*; *PB PFFCL 8*; *BMI PFFCL 26*; *Tr. 1469, 2786.* Indeed, the Public Broadcasters' economic expert conceded at the hearing that this constituted the appropriate task for the Panel. *Tr. 2786.*

The Public Broadcasters argue, however, that the Panel erred when it stated that the task before it was to determine what the "Public Broadcasters would pay to ASCAP and to BMI for the purchase of their blanket licenses for the current statutory period, in a hypothetical free market, *in the absence of the Section 118 compulsory license*." *PB Petition 9.* Specifically, the Public Broadcasters say the Panel erred in not taking into account certain "policy prescriptives" in setting the fees (*PB Petition 12)*, and that these policy prescriptives dictate that the prior agreements "inevitably" had to be chosen as the fair market value benchmark. *PB*

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2. BMI refers the Librarian to pages 14-16 of its Petition of July 22, 1998, for the "arbitrariness" standard governing his review of the Panel's decision.

Petition 13. The Public Broadcasters argue, therefore, that the Panel erred in holding that the prior agreements did not constitute an appropriate benchmark when considered in the light of the evidence about their negotiations, their no-precedent and non-disclosure terms, and other marketplace data offered in evidence.

The Public Broadcasters' argument is flawed through and through. First, the Public Broadcasters are wrong in claiming that there is some special meaning of fair market value "in the particularized context of § 118," which required the Panel to ignore marketplace evidence. *PB Petition 9.* Second, in any case, contrary to the Public Broadcasters' argument, neither the language of Sections 118 and 801 itself nor any "policy prescriptive" in their legislative history dictates that the fees set forth in the prior agreements "inevitably" constitute fair market value under Section 118. *PB Petition 11-13.*

1. Section 118 Does Not Require A CARP To Ignore Marketplace Facts.

The Public Broadcasters make the untenable argument that there is a distinction between, on the one hand, the notion of "fair market value" as derived from the market in copyrights, and, on the other hand, fair market value "in the particularized context of § 118." *PB Petition 9.* Citing to *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25,394, 25,409 (May 8, 1998) (the "DSTRA case"), the Public Broadcasters claim that "a statutory rate need not mirror a freely negotiated marketplace rate . . . because it is a mechanism whereby Congress implements policy considerations." *PB Petition 10.*

But the section of the Copyright Act the DSTRA case addressed has no bearing on the issues here. The DSTRA case addressed Section 114 of the Copyright Act, which concerns the price of digital performances in sound recordings, not Section 118. In enacting

Section 114, Congress specifically required a CARP to take into account certain specified statutory considerations in setting fees. Section 801(b) provides that CARPs are to make determinations as to reasonable terms and rates under Section 114, and mandated that the determination of those rates "shall be calculated to achieve" four statutorily specified objectives:

> "(A) To maximize the availability of creative works to the public;
>
> "(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under the existing economic conditions;
>
> "(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and
>
> "(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

17 U.S.C. § 801(b) (1996).

In enacting Section 118, by contrast, Congress did not set forth any policy considerations that a CARP had to take into account in setting fees. Section 801(b) conspicuously distinguishes between Sections 114, 115, and 116, which are subject to these four factors, and Section 118, which is not.

Unlike Section 114, where consideration of possible "disruptive impact" or even an outright subsidy was intended by Congress in granting the statutory license, it is clear from the legislative history of Section 118 that Congress did not intend the CARP to follow the Public Broadcasters' proposed distinction between "fair market value in the abstract" and "fair market value in the particularized context of § 118." To the contrary, Congress stated that the policy

underlying Section 118 is that copyright owners should not be required to subsidize public broadcasters. S. Rep. No. 94-473, at 101 (1975) ("As such, this provision does not constitute a subsidy of public broadcasting by the copyright proprietors since the amendment requires the payment of copyright royalties reflecting the fair value of the materials used.") (*ASCAP Direct Exh. 4*); H.R. Rep. No. 94-1476, at 118 (1976) ("The Committee does not intend that owners of copyrighted material be required to subsidize public broadcasting.") (*ASCAP Direct Exh. 5*). Congress enacted Section 118 solely to provide a means for public broadcasters, who were previously exempt from copyright liability for public performances because of the "for profit" language in the 1909 Copyright Act, readily to obtain access to copyrighted music, rather than to give them any financial break at the expense of copyright owners.

The Public Broadcasters argue that the CARP erred when it set its task as looking at what the Public Broadcasters would have to pay in the market, absent a statutory license. *PB Petition 11-13.* According to the Public Broadcasters, the CARP as a matter of law could only choose a benchmark for fair market value based on transactions under the shadow of the Section 118 statutory license itself, that is the prior agreements of these parties. Not only would this be contrary to precedent, *Rate Adjustment for the Satellite Carrier Compulsory License,* Docket No. 96-3 CARP SRA, 62 Fed. Reg. 55,742, 55,748-49 (Oct. 28, 1997), but it would also force the CARP into a hall of mirrors hermetically sealed off from the economic realities faced by the Public Broadcasters in their other dealings and by the copyright owners in theirs. A CARP hamstrung in this way would lack the tools even to approximate the subsidy-free fee intended by Congress in Section 118.

2. Section 118 Does Not Require A CARP To Attach Decisive Weight To Other Voluntary Agreements.

Lacking support in Section 801, which plainly distinguishes a Section 118 CARP's task from those under Sections 114, 115, and 116, the Public Broadcasters argue that "policy prescriptives" can be found in precatory language in Section 118 mandating that fees set forth in prior agreements "inevitably" should be used as the benchmark. The Public Broadcasters rely on the language of Section 118 to the effect that the Panel "may consider the rates for comparable circumstances under voluntary license agreements." *PB Petition 11.* The Public Broadcasters claim that, in view of this language, the Panel's "outright rejection of [the prior] agreements as potential — indeed, as the presumptively most logical — benchmarks for fee-setting was clearly contrary to the dictates of § 118 of the Act." *PB Petition 11.*

But the Panel did not simply ignore or refuse to consider the prior agreements as a possible benchmark. The Panel's Report discussed at length the prior agreements between the parties, and the Public Broadcasters' advocacy of them as the benchmark to be used herein. *Report 10, 17-23.* It was only after considering those agreements, their precise language, and the circumstances surrounding their execution, that the Panel determined to look elsewhere for a benchmark rate. *Id. 20-23.*

Even if the CARP had failed to consider prior agreements between the parties, this still would not — by itself — have rendered its choice of another benchmark as arbitrary. Contrary to the Public Broadcasters' argument, the language of Section 118 makes clear that a CARP is not *required* to consider other voluntary agreements under Section 118. Rather a CARP is simply *permitted* to consider such agreements. The Panel recognized this, noting that "[t]he Section 118 invitation to 'consider' prior agreements is expressly permissive." *Report 17*

n.28. [3] Thus, Section 118, which states a CARP "may" consider other agreements, grants a CARP the discretion to consider other voluntary agreements or not to consider them if it does not deem them to be relevant. Certainly, nothing in Section 118 precludes the Panel from considering voluntary agreements and rejecting them as an appropriate benchmark in light of other relevant evidence.

Since Section 118 does not even require a CARP to consider the voluntary agreements for the purposes of setting fees, it is simply erroneous to suggest, as the Public Broadcasters do, that the Panel went against "the dictates of § 118" in rejecting those fees as potential benchmarks in light of all the evidence. To the contrary, there was ample evidence justifying the Panel's decision to find that the prior agreements did not reflect fair market value.

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3. BMI has also argued that the precatory reference in Section 118 to other "voluntary agreements" is not to prior agreements between the same parties at all, but to agreements concerning the current five-year compulsory license period. The legislative history confirms this. The House Report explains that "at any time" means that the agreements that might be considered may be entered into "before, during, or after determinations by the Commission." H.R. Rep. No. 94-1476, at 118 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5732, 5733. This suggests that Congress referred to "voluntary" agreements in "comparable circumstances" that were negotiated around the same time as the CRT or CARP proceeding was taking place, such as the SESAC – Public Broadcasters agreement for the period 1998-2002 which was entered into shortly before this CARP was convened. *See id.* The Panel rejected BMI's argument on this point. *Report at 17 n.28.*

B. The Panel Correctly Analyzed The No-Precedent And Non-Disclosure Clauses.

The Public Broadcasters also complain that the Panel's analysis of the no-precedent and non-disclosure provisions in the respective ASCAP and BMI prior agreements was flawed. *PB Petition 13-18.*

As a threshold matter, it is important to note that the presence of the no-precedent and non-disclosure provisions was simply one piece of corroborative evidence — not the sole direct evidence — justifying the Panel's finding that the prior agreements did not constitute the appropriate benchmarks. As the Panel stated:

> "The Panel does not here find that the mere existence of a no-precedent clause renders prior agreements unacceptable *per se*. *Rather, after considering the totality of the circumstances, we find the non-precedent clause effectively corroborates ASCAP's assertion that it voluntarily subsidized Public Broadcasters in the past and now declines to continue such subsidization.*"

Report 22 (footnote omitted) (emphasis added). Both BMI and ASCAP offered extensive evidence of marketplace and political factors explaining why the prior agreements were not reliable benchmarks of fair market value. Therefore, the Panel's decision to reject the prior agreements as benchmarks for this case would be justified even if — contrary to fact — those prior agreements had not contained the no-precedent and the non-disclosure clauses.

In any case, the Panel correctly analyzed the non-disclosure provision in BMI's prior agreements for the years 1982, 1987, and 1992. The non-disclosure provision stated in pertinent part:

> " 'Except in response to lawful process of any legislative body or court, this writing shall be kept strictly confidential by the Parties, and its terms shall not be voluntarily revealed to any person, organization, or government or judicial body including, but not limited to, the Copyright Royalty Tribunal; nor shall it be shown, nor its terms disclosed, to any person who has no business or legal

need to know the terms.' "

Report 22 (quoting PB Direct Exhs. 14, 15, 16).

The Public Broadcasters claim that the Panel erred in finding that the "clear intent of [BMI's non-disclosure] provision" was "identical" to the ASCAP non-precedent clause — namely "to preclude use of a below market rate as a benchmark for setting future rates." [4] *Report 22-23; PB Petition 16.* The Panel, however, reached its conclusion based on an examination of the plain language of the non-disclosure clause and the ample record evidence showing the circumstances surrounding the agreement of BMI and the Public Broadcasters to the clause. Thus, the Panel correctly noted that "BMI insisted upon inclusion of the clause." *Report 22 (citing W.R. of Berenson 4; Tr. 2639).* The Panel also noted that "[n]o other plausible explanation has been offered by Public Broadcasters" to explain the non-disclosure provision other than that it was designed to preclude use of a below-market rate as a benchmark for setting

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4. The Panel correctly noted that the 1982, 1987, and 1992 ASCAP licenses with the Public Broadcasters contained the following identical or virtually identical non-precedential language:

> " '[The parties] agree that said license fee will have no precedential value in any future negotiation, proceeding before the Copyright Royalty Tribunal, court proceeding, or other proceeding between the parties.' "

Report 21 (quoting PB Direct Exh. 13 at 4). As with the BMI non-disclosure clause, "[t]hese no-precedent clauses were included in each agreement at the insistence of ASCAP." *Report 21 (citing W.R. of David 5-7).* The Panel noted that "[t]his clause clearly evinces an attempt by ASCAP to protect itself from future tribunals which might be tempted to use the prior agreement as a benchmark for establishing fair market value" and that the clause "effectively corroborates ASCAP's assertion that it voluntarily subsidized Public Broadcasters in the past and now declines to continue such subsidization." *Report 22.*

future rates. *Report 23.*

Certainly, the Public Broadcasters did not show that the Panel acted arbitrarily in finding that the intent of the non-disclosure provision in the BMI agreements was to preclude use of those agreements — which explicitly contemplate non-disclosure in the Copyright Royalty Tribunal — in a future proceeding. The Public Broadcasters' arguments to the contrary are without merit.

First, the Public Broadcasters claim that the Panel erred because the non-disclosure provision is merely a "standard form of non-disclosure." *PB Petition 16.* As a threshold matter, there is no evidence that the BMI non-disclosure provision was "standard" in any way. But, in any case, the fact that BMI might have insisted on including a "standard" clause in its prior agreements with the Public Broadcasters would not demonstrate that the Panel erred in finding that BMI's intent in including this "standard" clause was to preclude use of a below-market rate as a benchmark for setting future rates. *Report 23.*

The Public Broadcasters also assert that the "logical explanation" for why BMI insisted on the non-disclosure clause was solely because BMI's music share of 20 percent in relation to ASCAP was "embarrassingly low," and might undermine BMI's negotiations with other music users. *PB Petition 17-18.*[5] However, the non-disclosure provision did not extend to

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5. The Public Broadcasters also assert in a footnote that the Panel ignored evidence that BMI's "unsolicited, opening offer in 1992 [to the Public Broadcasters] was for a fee of $821,000 per year" and that the "parties eventually agreed upon a rate of $785,000 per year — less than 5% below the level BMI initially proposed." *PB Petition 18 n.3.* The Public Broadcasters suggest that this fact necessarily reflected "BMI's assessment of the fair value of its repertory to the Public Broadcasters during negotiations over the license covering the 1993 - 1997 period." *Id.* The Panel's decision to reject the Public Broadcasters' argument on this point was supported by overwhelming evidence of the

(Footnote continued on next page)

the public broadcasters' music usage data, which they were free to use however they liked.[6] It only covered the license agreement and the fee stated therein. If BMI's goal was to mask its music share, it would have asked for confidentiality as to the share data, not its fee.

In sum, the Panel was correct and not arbitrary in finding that the intent of BMI's non-disclosure provision was to preclude the use of the fees set in those agreements in future proceedings. In fact, it would have been arbitrary and contrary to prior CARP precedent for the Panel to have relied on the prior license agreements, when those agreements contained language that undermined their reliability as benchmarks. In the DSTRA case, the recent case concerning the digital performance of sound recordings, the CARP found that a prior partnership license agreement between DCR, one of the digital audio services in the proceeding, and two partner record companies, Warner Music and Sony Music (represented by the RIAA in the proceeding) was a "useful benchmark" for determining royalty fees because it provided a "useful precedent." 63 Fed. Reg. at 25,401. On petition to the Librarian to set aside the CARP's determination, the RIAA opposed the use of this agreement as a benchmark on several grounds, including that the "record companies never viewed the established rate as precedential." *Id.* The Librarian adopted the Register's finding that "[b]ecause the partnership agreement included language that undermined any precedential value of the digital performance license included therein, the

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business and political reasons why BMI opted for a status quo settlement at that time, postponing to another day the litigation now before the Librarian. *BMI RPFFCL 15-17.*

6. In fact, the non-disclosure provision barred BMI, but not the Public Broadcasters, from using the music usage data (cue sheets) created by PBS and supplied to BMI. *See, e.g., PB Direct Exh. 16 at 6-7.*

Register finds that the Panel's reliance on the DCR license fee as precedent was an arbitrary action. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (agency action is arbitrary where the agency offers an explanation for its decision that runs counter to the record evidence)." *Id.* at 25,403.

C. The Panel Correctly Found That BMI And ASCAP Were Providing A Voluntary Subsidy To The Public Broadcasters Under The Prior Agreements.

The Public Broadcasters further claim that the Panel erred in finding that the disparity between fees paid by the commercial broadcasters and the Public Broadcasters constituted evidence of a voluntary subsidy. *PB Petition 18-20.* To the contrary, this comparison was absolutely necessary for any determination of fair market value. As we argue in BMI's Petition herein, the Panel did not rely sufficiently on this overwhelming evidence that the Public Broadcasters have been subsidized by BMI's songwriters, composers, and publishers.

The Public Broadcasters' only effort to explain away the huge differential in their fees from marketplace rates paid by the commercial broadcasters was to offer a purely theoretical observation: that "different users will value similar goods and services differently and that different entities can and do negotiate different rates for the same or similar commodities." *PB Petition 19.* As the Panel recognized (*Report 23*), the Public Broadcasters offered no evidence to support the assertion that commercial and non-commercial broadcasters in fact purchase programming inputs in separate and distinct markets. Thus, the Public Broadcasters offered no evidence demonstrating that the Public Broadcasters pay lower fees for other programming inputs, such as producers, scriptwriters, or actors — even though such evidence, if it existed at all, could be expected to be found solely in the possession of the Public Broadcasters. In fact, all the evidence adduced in this proceeding demonstrated that commercial and public broadcasting

operate in the same market for the purposes of music use. *See BMI PFFCL 31-33.*

Thus, the Panel acted entirely appropriately in rejecting the Public Broadcasters' argument. The Panel stated:

> "Public Broadcasters have not, or can not, cite any factual bases which might account for the huge disparity between the recent ASCAP/BMI commercial rates and the rate for Public Broadcasters under the prior agreements (even after adjusting commercial rates based upon various parameters). *Public Broadcasters merely offer the general, but unhelpful, observation that "[t]he difference in rates in accounted for by the fact that commercial and non-commercial broadcasters operate in separate and distinct markets." PB PFFCL 81.* If, for example, evidence had been adduced demonstrating that Public Broadcasters pay less than commercial broadcasters for other music-related programming expenses (such as radio disk jockeys, musicians, producers, writers, directors, or equipment operators), the Panel might feel more comfortable accepting the heavily discounted music license fees as fair market rates. Virtually no such evidence was adduced. To the contrary, it appears that the Public Broadcasters pay rates competitive with commercial broadcasters for other music-related programming costs such as composers' 'up front fees.' "

Report 23 (emphasis added).

The Public Broadcasters also suggest that the Panel incorrectly gave undue weight to the unrebutted testimony of a BMI composer witness in BMI's direct case in finding that up-front payments for composers were generally the same with respect to commercial and public broadcasting. *PB Petition 19-20.* This suggestion is unfounded.

The BMI's composer's testimony on this point was unchallenged on cross-examination by the Public Broadcasters. And the Public Broadcasters failed to present any evidence in their rebuttal case from a station representative, a producer, or anyone else refuting the BMI composer's testimony on this point. Moreover, this testimony was corroborated by another BMI witness in BMI's direct case who was involved in the *production* of programming for both commercial and public television. She confirmed that music budgets were the same

regardless of whether the program appeared on commercial or public television:

> "Q: Was additional money paid to composers if their music was to appear on PBS as opposed to NBC?
>
> "A: No, the music budget was the same."

Tr. 1573; *see also W.D. of McFadden 5.* This testimony was also unchallenged and unrebutted by the Public Broadcasters.

There is no basis to assert that the Panel acted arbitrarily in finding that the vast and unjustified disparity that has existed between the fees paid by the Public Broadcasters and those paid by other broadcasters constitutes a subsidy. In fairness, as BMI has asserted in its Petition, the Panel should have closed entirely the unexplained gap between the fees awarded herein and what all other American broadcasters pay.

II. THE LIBRARIAN SHOULD ADOPT IN PART AND REJECT IN PART THE MODIFICATIONS PROPOSED BY ASCAP.

A. The Librarian Should Adopt The Majority Of The Modifications Proposed By ASCAP.

BMI agrees with much of ASCAP's position set forth in its Petition. Specifically, BMI agrees with ASCAP's claim that the Librarian should reject the Panel's formula for setting fees and that it should set the fees for public broadcasting by comparing them with commercial fees. *ASCAP Petition 21-25.*

If the Librarian determines not to reject the Panel's Report in its entirety, BMI agrees with most of the proposed modifications to the Panel's method made by ASCAP. In three cases, ASCAP identified the same errors in the Panel's Report as those identified by BMI:

1. The Panel erred in adjusting the 1978 benchmark fee on the basis of the revenues received by ASCAP in 1978 rather than those received in 1976. If the Panel's method for determining fees is to be used, the 1978 CRT-set fee should be projected on the basis of the 1976 revenues of public broadcasting. *ASCAP*

Petition 5-7; see also BMI Petition 27-29.

2. The Panel's finding that there was no increase in overall music use by the Public Broadcasters since 1978 was contrary to the evidence. If the Panel's method for determining fees is to be used, the increase in Public Broadcasters' music use since 1978 should be taken into account. *ASCAP Petition 13-17; see also BMI Petition 29-33.*

3. The Panel erred in using the growth in public broadcasting's total revenues to adjust the 1978 benchmark fee to account for current circumstances. Given that the Panel accepted that public broadcasting had grown increasingly commercial in recent years, and that this increasing commercialization was relevant to the issue of setting the licensing fees in this case, the Panel should have adopted a method that took this into account. Specifically, the Panel should have adjusted the CRT-set fee on the basis of the growth in public broadcasting's private revenues. If the Panel's method for determining fees is to be used, the 1978 CRT-set fee should be adjusted on the basis of the growth in the Public Broadcasters' private revenues. *ASCAP Petition 21-25; see also BMI Petition 35-39.*

In addition BMI joins in the following arguments in which ASCAP identified other errors in the Panel Report not highlighted by BMI in its Petition.

1. The Panel erred in excluding $122 million of Public Broadcasters' revenues in 1996. If the Panel's method for determining fees is to be used, the 1978 CRT-set fee should be projected on the 1996 revenues without the arbitrary exclusion of $122 million. *ASCAP Petition 7-9.*

2. The Panel erred in failing to provide for interim adjustments to the proposed fee to take into account potential changes in Public Broadcasters' revenues or inflation. If the Panel's method for determining fees is to be used, it should be adjusted to take into account changes in the Public Broadcasters' revenues and inflation over the length of the five-year license term. *ASCAP Petition 9-11.*

3. The Panel erred in finding that ASCAP, BMI and the Public Broadcasters should each bear one-third of the costs of the proceeding. For the reasons set forth in ASCAP's Petition, the costs should be allocated equally between the copyright owners (ASCAP and BMI) and the copyright users (PBS and NPR). *ASCAP Petition 26-29.*

B. The Panel Should Reject Two Other Modifications Proposed By ASCAP.

ASCAP proposes two modifications to the Panel's Report for which it provides no support.

First, ASCAP claims that the Panel erred in "assum[ing] that all music is fungible and that the repertories of ASCAP and BMI are completely interchangeable as far as Public Broadcasters, as music users, are concerned." *ASCAP Petition 13.* ASCAP claims that the Panel should have undertaken an "individualized valuation of [ASCAP's and BMI's] repertory." *Id.* According to ASCAP, the relative usage of ASCAP's and BMI's repertoires was simply irrelevant to the Panel's task. *ASCAP Petition 12-13.*

BMI disagrees with ASCAP's position. One of the cornerstone principles of American jurisprudence requires that persons similarly situated should be treated similarly by the law. For that reason, one of the recognized signs of arbitrary action by an administrative body is a failure to treat similarly situated persons in similar fashion. And the Librarian has so held for CARP proceedings. The Librarian has stated that a Panel's determination is arbitrary and subject to reversal when the Panel's "action entails the unexplained discrimination or disparate treatment of similarly situated parties." *DSTRA*, 63 Fed. Reg. at 25,398. Both BMI and the Public Broadcasters presented evidence — unchallenged by ASCAP — concerning the relative usage of the BMI and ASCAP repertoires by public television stations. It was entirely appropriate for the Panel to utilize this evidence to assure that equity was done as between BMI and its affiliated composers and publishers on the one hand, and ASCAP and its member composers and publishers on the other. On the record in this case, it would have been arbitrary not to.

Second, ASCAP also claims in the proceeding "BMI estimated that less than a third of all public radio station broadcasts contain any BMI music at all" (*ASCAP Petition 18*), whereas ASCAP presented evidence of a "gargantuan" amount of ASCAP music on public radio. *ASCAP Petition 18.*

ASCAP simply mischaracterizes BMI's position. BMI never said that only one-

third of programs on public radio contain BMI music. Because of the small license fees previously paid, the fact is that BMI had never undertaken any comprehensive analysis of music use on public radio. Rather, in attempting to determine the amount of copyrighted music played on public radio relative to that on commercial radio for the purpose of adjusting commercial license fees to the public radio context, BMI made a conservative assumption for purpose of formulating its fee proposal — and one it acknowledged to be inaccurate — that copyrighted music was not heard on public radio programming listed in certain format categories: classical music programs and news and information programs. *BMI PFFCL 54-55.* The same exact assumption, with its conservative bias against copyrighted music usage, would be equally applicable to ASCAP. As with ASCAP, BMI too presented evidence that music by its symphonic composers in fact appears in classical music formatted programs on public radio (*see W.D. of Smith 14-15),* and that its repertoire is heard in the themes and "bumpers" interspersed throughout public radio's talk-format programs. *W.D. of Willms 25.*

In any case, for all its protestations, ASCAP never offered any evidence as to the music shares of BMI and ASCAP on public radio (*BMI PFFCL 54*), even though the Panel, at the close of the parties' direct cases, had specifically requested evidence on how to apportion the fees between BMI and ASCAP. *Tr. 3000-01.* In these circumstances, the Panel appropriately used BMI's and ASCAP's music shares on public television in adjusting its benchmark for the Public Broadcasters as a whole, noting that the parties in the course of negotiating the prior agreements did exactly the same thing. *Report 32 n.42.*

BMI in its Petition challenges the use by the Panel of the 1978 CRT decision as to ASCAP as a benchmark for this proceeding. But having made that choice, it was entirely necessary for the Panel to adjust any fee awards based on that benchmark for relative music

usage, and the Panel acted rationally in making the adjustment on the basis of the evidence presented.

III. BMI DOES NOT OPPOSE SESAC'S PROPOSED MODIFICATION.

SESAC — which was not a party to the proceeding — seeks to modify the Panel's finding that "[t]he repertory of the third performing rights organization, SESAC, not a party to this proceeding, comprises only about one-half of one percent of PBS's music use." *Report 6 n.10, citing W.D. of Jaffe 3 n.2.* SESAC wants to replace this sentence with the following language: "The repertory of the third performing rights organization, SESAC, which has entered into a confidential settlement of its claims with PBS and is therefore no longer a participant in this proceeding, represents only a small percentage of PBS's music use, the precise extent of which the Panel is not here called upon to determine." *SESAC Petition 19* (emphasis added.)

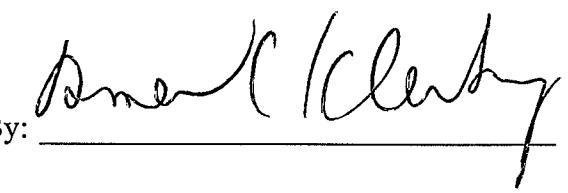
BMI does not oppose modifying the Panel's Report. However, BMI believes that a better way to achieve the same result and to accommodate SESAC's concerns would be to leave footnote 10 on page 6 of the Panel's Report otherwise unchanged, but to include the following sentence at the end of that footnote: "The Panel's finding as to SESAC's music share is based solely on evidence submitted by the Public Broadcasters, and, in view of SESAC's absence from the proceeding, is deemed to be non-precedential as to SESAC in a future proceeding."

CONCLUSION

For the foregoing reasons, BMI respectfully requests that the Librarian reject the modifications requested by the Public Broadcasters in their Petition, reject in part and adopt in part the modifications requested by ASCAP in its Petition. Furthermore, BMI does not oppose the modification proposed by SESAC. BMI further respectfully requests that the Librarian set aside the Panel's Report dated July 22, 1998 or substantially modify it as requested in BMI's Petition dated August 5, 1998.

Dated: August 19, 1998

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, David L. Sorgen, an attorney, hereby certify that I caused a copy of the foregoing Reply of Broadcast Music, Inc. to the Petitions for Review of the Public Broadcasters, ASCAP, and SESAC, Inc. in the Matter of Adjustment of Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6, in the Library of Congress, to be delivered by messenger on this 19th day of August, 1998 to each of the parties listed on the attached service list.

Deponent is over the age of 18 and not a party to this proceeding.

I further certify under penalty of perjury that the foregoing is true and correct.

Executed on August 19, 1998.

David L. Sorgen

David L. Sorgen

W6-NY982250.208

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